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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

KOUT FINANCIAL,

Plaintiff and Respondent,

v.

KEN CHEN CHENG,

Defendant and Appellant.

B235773

(Los Angeles County  
Super. Ct. No. KC060119)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Peter J. Meeka, Judge. Reversed.

Lew Law Firm, Bill W. Lew; Esner, Chang & Boyer and Stuart B. Esner, for  
Defendant and Appellant.

Lester & Cantrell, David Cantrell, Matthew J. Kraus; Greenblatt & Associates and  
Fredric J. Greenblatt for Plaintiff and Respondent.

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## INTRODUCTION

Defendant Ken Chen Cheng (Cheng) appeals from a judgment entered against him after the trial court granted summary judgment in favor of plaintiff Kout Financial, LLC (Kout). Cheng guaranteed two loans made by Cathay Bank to a company owned by Cheng and his wife, Peichin Lee Cheng. Cathay Bank later foreclosed on the trust deed and sold the loans and Cheng's guaranty to Ming Chih Lee (Lee), which Lee in turn assigned to Kout, a company he owned. We conclude that Cheng's declaration that he was not in the United States on the date of his signature on the guaranty creates a triable issue of fact as to whether he signed the guaranty and whether his signature was forged. His prior deposition testimony about his signature on the guaranty was equivocal, and thus credible evidence in a later declaration that contradicted that equivocal testimony can be considered. We reverse the judgment.

## FACTUAL AND PROCEDURAL HISTORY

CGM Development, Inc. is a corporation that builds and develops commercial real property. CGM Development is owned by Ken Chen Cheng (Cheng) and Peichin Lee Cheng, who have been married for 20 years but are currently in a pending divorce proceeding. Cheng and Peichin Lee Cheng own several other real property development companies, one of which is CGM The Golden Palms, LLC (CGM).

On March 8, 2007, Cathay Bank entered into a business loan agreement with CGM to provide financing to CGM, which executed and delivered to Cathay Bank a promissory note for \$7,859,845 (Note 1). To secure payment of Note 1, CGM provided a deed of trust securing real property to Cathay Bank. Also on March 8, 2007, CGM executed and delivered to Cathay bank a promissory note for \$2,640,155 (Note 2). A March 8, 2007, guaranty of payment and performance of \$10.5 million to Cathay Bank shows a signature of Cheng, although he disputes the genuineness of that signature and alleges that he did not sign and initial the guaranty because he was outside the United States from March 5 to March 23, 2007.

CGM failed to make payments on Notes 1 and 2, resulting in a default under those notes. Cheng knew CGM had defaulted on its payment obligation to Cathay Bank, knew of no payments made to Cathay Bank to cure the default, and did not dispute the amount Cathay Bank said was outstanding on the loan.

On September 25, 2009, Cathay Bank foreclosed on the trust deed that secured payment of Note 1, which had an outstanding balance of \$8,165,414.04. At the foreclosure sale, Cathay Bank paid \$4,020,448 to purchase the property that was the subject of the deed of trust. At least \$2,654,496.31 is due on Note 2.

Peichin Lee Cheng and Ming Chih Lee (Lee) are sister and brother. On May 4, 2010, Lee entered into a non-recourse loan sale (the loan purchase agreement) with Cathay Bank. Lee paid \$650,000 to Cathay Bank to purchase loan documents, which included the business loan agreement, Notes 1 and 2, and the commercial guaranty of March 8, 2007, as to Cheng. Cheng alleges that Lee did not sign the loan purchase agreement, which was instead signed by Peichin Lee Cheng, so there was no valid agreement between Lee and Cathay Bank. Lee stated that he received all of Cathay Bank's rights under the loan documents, and thus purchased the right to enforce the loan documents and the guaranty.

Lee owns Kout. On May 28, 2010, Lee assigned the loan purchase agreement to Kout, the plaintiff in this lawsuit. Cheng disputes this assignment to Kout, alleging that he did not sign the guaranty; that Lee did not sign the loan purchase agreement (which was instead signed by Peichin Lee Cheng) and thus there was no valid agreement between Lee and Cathay Bank; that Lee did not sign the \$650,000 check to Cathay Bank as payor, which was instead signed by Peichin Lee Cheng; that at least \$260,000 of the \$650,000 Lee paid Cathay Bank was diverted to Lee by Peichin Lee Cheng via her companies CGM. Capital, Inc. and CGM. West Covina, LLC; and that Peichin Lee Cheng forged Cheng's signature on the General Release which was a condition of the loan purchase agreement.

Kout and Lee have received no payment from Cheng.

On January 25, 2011, Kout filed a first amended complaint for breach of guaranty against Peichin Lee Cheng and Cheng. Kout alleged that defendants were guarantors of two loans from Cathay Bank to CGM secured by trust deeds in real property, that CGM defaulted on the loans, and that Cathay Bank completed a non-judicial foreclosure on the property secured by the trust deeds and paid \$4,020,448 for the property at the trustee sale. After the foreclosure, Cathay Bank sold its rights under the loan documents to Lee, who assigned his rights to Kout. The complaint alleged that Peichin Lee Cheng and Cheng had not paid the loan balance to Kout.

Kout moved for summary judgment against Cheng on March 7, 2011. After Cheng filed opposition, the trial court granted Kout's motion and entered judgment for plaintiff and against Cheng in the amount of \$6,799,462.35 on July 18, 2011. Cheng filed a timely notice of appeal.

### ISSUES

Cheng claims on appeal that *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1 (*D'Amico*) does not preclude Cheng from declaring that he did not sign the original guaranty.

### DISCUSSION

#### 1. *Standard of Review*

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of

material fact exists as to that cause of action . . . .’ [Citations.]” (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.)

2. *The Existence of a Triable Issue of Fact as to Whether Cheng Signed the Guaranty Requires Reversal of Summary Judgment*

Cheng claims that the trial court erroneously sustained objections to Cheng’s declaration stating that he did not sign the guaranty that forms the basis for his liability.

A guarantor (or surety—the terms have the same meaning) is one who promises to answer for the debt, default, or miscarriage of another. (Civ. Code, § 2787.) A contract of guaranty gives rise to an obligation separate and independent from that of the principal debt. (*Talbott v. Hustwit* (2008) 164 Cal.App.4th 148, 151.) Subject to some exceptions in Civil Code section 2794, a guaranty obligation must be in writing and must be signed by the guarantor. (Civ. Code, § 2793.)

The basis for Cheng’s alleged obligation is his signature as guarantor on a guaranty for two construction loans made by Cathay Bank to CGM, which were later assigned to Lee, who in turn assigned them to plaintiff Kout. Cheng’s alleged signature as guarantor appears on the final page of the four-page guaranty. Cheng’s opposition to the summary judgment motion included Cheng’s declaration, in which Cheng stated that the signature on the guaranty was not his signature. Cheng stated that he could not have signed the guaranty, dated March 8, 2007, because he was not in the United States on that date. Cheng provided a copy of his passport, showing that he left the United States on March 5, 2007, arrived in Taiwan on March 6, 2007, left Taiwan on March 14, 2007, entered China on March 14, 2007, left China on March 23, 2007, and returned to the United States.

Kout objected to this evidence as inconsistent with Cheng’s earlier deposition testimony. In his deposition, referring to the guaranty agreement listing Cathay Bank as lender and Ken Cheng as guarantor, Cheng testified:

“Q: I want you to turn to the very last page, page 4.

“A: Yes.

“Q: Is that your signature at the bottom?

“A: It looks like my signature.

“Q: Do you have any reason to believe it’s not your signature?

“A: No. No.

“Q: ‘No’ you don’t have a reason to believe that?

“A: I believe that’s my signature.”

Kout objected that Cheng could not later avoid summary judgment by denying his deposition testimony, under the rule that admissions or concessions made during discovery control over contrary declarations lodged at a hearing in summary judgment motion. The trial court sustained this objection to Cheng’s evidence.

Where a declaration prepared in opposition to a summary judgment motion conflicts with the declarant’s deposition testimony, the trial court may disregard the declaration and conclude there is no substantial evidence that a triable issue of fact exists. (*D’Amico, supra*, 11 Cal.3d at p. 22; *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1087.) A party’s deposition testimony, however, is not an incontrovertible judicial admission of a fact that bars the party from introducing other evidence controverting that fact. (*Whitmire*, at p. 1089.) Cheng’s deposition testimony about his signature on the guaranty was equivocal. He testified that the signature on the guaranty “looks like my signature,” agreed that he had no reason to believe it was not his signature, and said he “believed” it was his signature. These expressions are not the same as stating “I signed the guaranty” or “That is my signature on the guaranty.” Where admissions in discovery responses are equivocal concessions, evidence in declarations which contradict those admissions can be considered. (*Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 480, 482.)

The *D’Amico* rule is limited to instances where only a party’s self-serving declarations contradict credible discovery admissions. (*Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1521.) The evidence in Cheng’s declaration, citing copies of pages in his passport showing that he had traveled outside the United States from March 5 to March 23, 2007, and thus could not have signed the guaranty on March 8, 2007, cannot be dismissed as “self-serving.” Instead it is credible evidence which

contradicts Cheng's prior equivocal statements, which may be therefore be disregarded. (*Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 516.) As such it is sufficient to create a triable issue of fact as to whether Cheng in fact signed the guaranty. Summary judgment, moreover, is inappropriate where the opposing party submits evidence that a mistake was made in a discovery response. (*Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1067.)

Cheng's evidence has created a triable issue of fact whether he signed the guaranty on which he is now being sued. As stated, Civil Code section 2793 requires a written guaranty obligation to be signed by the guarantor. (*Estate of Stephens* (2002) 28 Cal.4th 665, 679.) If it is not, the guaranty is unenforceable in a judicial proceeding. (*Kinney v. Jos. Herspring & Co.* (1921) 53 Cal.App. 628, 636.) The existence of a triable issue as to whether Cheng signed the guaranty requires reversal of summary judgment.

#### DISPOSITION

The judgment is reversed. Costs on appeal are awarded to defendant Ken Chen Cheng.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.